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# Trusts -- Rule Against Perpetuities -- Class Gifts

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put on the definition of customer lists and knowledge as trade secrets is unknown. A prior confidential relationship would probably be required. If a narrow view of the dictum in the *Kadis* case is taken, it may be indicative that North Carolina would be reluctant to restrain competitive solicitation where the former employee relies upon memory alone though the door is left open where the names remembered were acquired and used in breach of trust. It should be remembered that there is substantial case authority in other jurisdictions approving the rule that lists remembered are likewise protectable.

DAVID M. CONNOR

### Trusts—Rule Against Perpetuities—Class Gifts

In *Parker v. Parker*<sup>1</sup> a testator devised certain property to his son in trust, the rents and profits therefrom to be used for the education of the son's children in such amounts as the trustee in his discretion deemed necessary. The trustee was directed to convey the property to the grandchildren (or grandchild) or to the issue of any deceased grandchild "when" the youngest grandchild reached twenty-eight. The North Carolina Supreme Court held that the latter provision violated the Rule Against Perpetuities.

In North Carolina the Rule Against Perpetuities has been stated as follows: "No devise or grant of a future interest in property is valid unless title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest."<sup>2</sup> The effect of the

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a contract in its true sense is not sought. Prevention of unfair competition is the reason for seeking equitable interference." This statute should be applicable only to express agreements between the parties, not to what the law implicitly recognizes as unfair competition. The parties can agree to reasonably limit the employee from competing if such agreement is reduced to writing and signed by the employee. But the master-servant or agency relationship found in the cases discussed does not limit the employee's right to compete, but merely the methods that he may use.

<sup>1</sup> 252 N.C. 399, 113 S.E.2d 899 (1960).

<sup>2</sup> *Id.* at 402, 113 S.E.2d at 902. The North Carolina court often has incorrectly stated that the interest must vest in not *less* than twenty-one years. This has not, however, affected any of the decisions. See *Finch v. Honeycutt*, 246 N.C. 91, 97 S.E.2d 478 (1957); *McPherson v. First Citizens Nat'l Bank*, 240 N.C. 1, 80 S.E.2d 386 (1954); *Fuller v. Hedgpeth*, 239 N.C. 370, 80 S.E.2d 18 (1954); *McQueen v. Branch Banking & Trust Co.*, 234 N.C. 737, 68 S.E.2d 831 (1952). The rule is properly stated in the principal case and also in *Clarke v. Clarke*, 253 N.C. 156, 116 S.E.2d 449 (1960).

rule is to prescribe the time within which an interest must vest,<sup>3</sup> thus the rule will affect only contingent interests.<sup>4</sup> The rule is not concerned with the postponement of possession,<sup>5</sup> with accumulation,<sup>6</sup> with suspension of alienation,<sup>7</sup> or with duration.<sup>8</sup> However, the rule may not be evaded by the creation of a private trust.<sup>9</sup> It applies to the time when the legal interest vests in the trustee, as well as to the time when the equitable or beneficial interest vests in the beneficiary.<sup>10</sup>

The problems presented in the *Parker* case are of particular importance to the practicing attorney in that there is an increasing number of persons who wish to provide in their wills for the establishment of a trust giving the trustee some discretion in the use of the income in case of unforeseen circumstances and providing for the distribution of the corpus when the beneficiary attains such age as the testator thinks necessary for him to be able to intelligently manage his own affairs. If we assume that such testamentary disposition is a good one and that the testator's intention should be carried out, it would seem that the gift in the principal case could have been saved without doing violence to present North Carolina law.

In order to hold the gift valid in the principal case the court would have to consider three problems: (1) Is the membership in

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<sup>3</sup> *McQueen v. Branch Banking & Trust Co.*, *supra* note 2.

<sup>4</sup> *Parker v. Parker*, 252 N.C. 399, 113 S.E.2d 899 (1960).

<sup>5</sup> *Fuller v. Hedgpeth*, 239 N.C. 370, 80 S.E.2d 18 (1954). See generally GRISWOLD, SPENDTHRIFT TRUSTS § 513 (2d ed. 1947).

<sup>6</sup> *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. 50 (1889).

<sup>7</sup> *Manierre v. Welling*, 32 R.I. 104, 78 Atl. 507 (1911). See generally 6 AMERICAN LAW OF PROPERTY § 26.2 (Casner ed. 1952).

<sup>8</sup> *Seaver v. Fitzgerald*, 141 Mass. 401, 6 N.E. 73 (1886); *McQueen v. Branch Banking & Trust Co.*, 234 N.C. 737, 68 S.E.2d 831 (1952). See generally GRAY, THE RULE AGAINST PERPETUITIES § 205 (4th ed. 1942); RESTATEMENT, PROPERTY § 370 (1944); 2 SIMES, FUTURE INTEREST § 500 (1936). But see *American Trust Co. v. Williamson*, 228 N.C. 458, 46 S.E.2d 104 (1948), where the North Carolina Supreme Court stated that the rule limits the duration of private trusts. This statement was repudiated in *McQueen v. Branch Banking & Trust Co.*, *supra*. However, language used by the court in *Finch v. Honeycutt*, 246 N.C. 91, 97 S.E.2d 478 (1957), discussed in 36 N.C.L. Rev. 467 (1958), may reopen the possibility that a private trust might be held invalid because full enjoyment is postponed for an excessive period of time.

<sup>9</sup> *McQueen v. Branch Banking & Trust Co.*, *supra* note 8; *American Trust Co. v. Williamson*, *supra* note 8. For a discussion of the effect of the rule on charitable trusts, see 2 BOGERT, TRUSTS AND TRUSTEES § 352 (1935).

<sup>10</sup> *McQueen v. Branch Banking & Trust Co.*, 234 N.C. 737, 68 S.E.2d 831 (1952).

the class of grandchildren ascertainable within the period of the Rule Against Perpetuities? (2) Do the gifts to the grandchildren vest within the period of the rule? (3) Are the gifts to the issue of any deceased grandchild (or grandchildren) valid and if not, what effect does this have on the gift to the grandchildren?

As to the first of these problems, the court interpreted the will to mean that all the children of the testator's son, including such children as might be born after the testator's death, were to be included in the gift. The court then concluded that the class membership was not ascertainable until the termination of the trust. In so deciding, however, the court failed to consider the grandchildren as a class separate and distinct from the issue. If the court had made this distinction, there is respectable authority for holding the gift valid.

Such a distinction was made in *Hill v. Birmingham*.<sup>11</sup> In this case the will establishing the trust provided that the income therefrom was to be used in equal shares for the benefit of the testator's grandchildren as the trustee, in his discretion, might deem proper. The principal was to be paid to them in equal shares "when" the youngest grandchild attained the age of twenty-five. There was a further provision that if any grandchild should die leaving issue, his share would go to his issue. In holding that the gift did not violate the Rule Against Perpetuities the court stated: "No grandchild could be born to the testator later than the time when the survivor of his son or daughter died, with a possible addition of nine months representing the period of gestation, and consequently the class would necessarily close at that time."<sup>12</sup>

Applying the rationale of *Hill* to the principal case, it would be impossible for grandchildren to be born more than a nine months period of gestation after the death of the testator's son whose life can be taken as the measuring life. The class would close at that time, and any interest which vested within the period in which grandchildren could be born would not violate the Rule Against Perpetuities.<sup>13</sup>

The second problem would be whether the gifts to the grandchildren would vest within the period prescribed by the rule. It is

<sup>11</sup> 131 Conn. 174, 38 A.2d 604 (1944).

<sup>12</sup> *Id.* at 177, 38 A.2d at 606. While the court appears to have assumed that the postponement of enjoyment was valid, the issue was not raised in the case.

<sup>13</sup> See *id.* at 177, 38 A.2d 607.

generally held that where a trust gives all or a part of the income to the beneficiary, with directions to the trustee to divide and deliver the estate at a stated time in the future, the interest in the estate vests immediately upon the death of the testator.<sup>14</sup> Conversely, where there is no gift of the income or the estate distinct from the division which is to be made equally between all the children upon the termination of the trust, the "when" of the division marks the time of the vesting.<sup>15</sup> In applying the latter rule to the facts of the *Parker* case the court stated: "[T]here is no bequest of the income to the class as a whole or to any individual in the class, nor is there any gift of the *corpus* apart from the provision for conveyance *per stirpes* when the trust has terminated."<sup>16</sup> In making this statement the court was apparently relying on the rule that a gift of income must be in specified amounts in order to cause the age contingency to apply to the payment of the gift rather than to its vesting.<sup>17</sup> However, the court could have reached an opposite result by applying the rule that a discretionary trust for the maintenance of a class is effective to vest the otherwise contingent gift.<sup>18</sup>

While the problem of the vesting of the corpus of a discretionary trust for the maintenance of a class apparently has not arisen in North Carolina, it has been held that a discretionary gift of income is effective to cause the immediate vesting of the corpus in the individual beneficiary. In *Jackson v. Langley*<sup>19</sup> property was willed

<sup>14</sup> *Jackson v. Langley*, 234 N.C. 243, 66 S.E.2d 899 (1951); *Carter v. Kempton*, 233 N.C. 1, 62 S.E.2d 713 (1950); *Sutton v. Quinerly*, 228 N.C. 106, 44 S.E.2d 521 (1947); *Robinson v. Robinson*, 227 N.C. 155, 41 S.E.2d 282 (1947); *Chas. W. Priddy & Co. v. Sanderford*, 221 N.C. 422, 20 S.E.2d 341 (1942); *Coddington v. Stone*, 217 N.C. 714, 9 S.E.2d 420 (1940); *Weill v. Weill*, 212 N.C. 764, 194 S.E.2d 243 (1938).

<sup>15</sup> *Knox v. Knox*, 208 N.C. 141, 179 S.E. 610 (1935); *Bowen v. Hackney*, 136 N.C. 187, 48 S.E. 633 (1904); *Fuller v. Fuller*, 58 N.C. 223 (1859); *Anderson v. Felton*, 36 N.C. 55 (1840).

<sup>16</sup> 252 N.C. at 407, 113 S.E.2d at 905.

<sup>17</sup> *Paterson Sav. Inst. v. De Gray*, 136 N.J. Eq. 371, 42 A.2d 264 (Ct. Ch. 1945); *In re Helme's Estate*, 95 N.J. Eq. 197, 123 Atl. 43 (Prerogative Ct. 1923); *In re Mervin*, [1891] 3 Ch. 197; *In re Parker*, 16 Ch. D. 44 (1879); *Lloyd v. Lloyd*, 3 K. & J. 20, 69 Eng. Rep. 1005 (Ch. 1856).

<sup>18</sup> *Fidelity Union Trust Co. v. Dignan*, 105 N.J. Eq. 750, 146 Atl. 466 (Ct. Ch. 1929); *Hayes v. Robeson*, 29 R.I. 216, 69 Atl. 686 (1908); *In re Williams*, [1907] 1 Ch. 180; *Fox v. Fox*, L.R. 19 Eq. 286 (1875); *Harrison v. Grimwood*, 12 Beav. 192, 50 Eng. Rep. 1033 (Ch. 1849). The court also found that the language of the will indicated an intent on the part of the testator to postpone the vesting of the estate until the youngest child reached twenty-one. It would appear unlikely, however, that the testator would have preferred the whole gift to fail rather than be partially effective.

<sup>19</sup> 234 N.C. 243, 66 S.E.2d 889 (1951).

to a trustee with directions that the net income be applied to the support and education of the testatrix's son. It was further provided that "when" the beneficiary reached the age of twenty-five all the property or the remainder thereof was to vest absolutely in him. In the event certain enumerated emergencies arose the trustee could use the income from or the corpus of the trust estate for his own benefit. The court held that the vesting of the estate in the son was not in any way affected or delayed to any greater extent than if the trustee had been given a life estate with the power to use any part of the corpus for his own benefit. The court stated:

The overwhelming weight of authority, including our own decisions, supports the view that in such cases the estate vests in the ultimate beneficiary upon the death of the testator, subject to be divested of such portion thereof as may be required to meet the authorized needs of the life tenant or other designated person.<sup>20</sup>

This decision would seem to support the view that in the *Parker* case the corpus would vest in the children in esse at the death of the testator, subject to partial divestment in favor of after born children or subject to total divestment in the event of death.<sup>21</sup>

If it is assumed that there is an immediate vesting of the estate in the children in esse at the testator's death, subject to divestment, the question arises whether the possibility that such divestment might take place at a time beyond the permissible period would invoke the rule. The court in the principal case cited what is supposedly a split of authority on this problem, first citing authority for the proposition that a vested gift, though subject to a condition subsequent, does not come within the rule.<sup>22</sup> The court then cited authority for the view that an executory interest is not vested until the time comes for taking possession.<sup>23</sup> As the latter view would

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<sup>20</sup> *Id.* at 246, 66 S.E.2d at 901. See *In re Sessions Estate*, 217 Ore. 340, 341 P.2d 512 (1958), where property was left in trust for A, who was unborn at the time. The trustee was given discretionary power to apply the income for A's benefit. The corpus was to go to A "when he shall reach 25." The court held that the estate was vested, subject to divestment.

<sup>21</sup> See *Pearson v. Dolman*, L.R. 3 Eq. 315 (1866), and *Scotney v. Lomer*, 31 Ch. D. 380 (1883), holding that the fact that the gift of income is defeasible does not prevent the gift from causing the immediate vesting of the interests.

<sup>22</sup> *Shoemaker v. Newman*, 65 F.2d 208 (D.C. Cir. 1933); *In re Friday's Estate*, 313 Pa. 328, 170 Atl. 123 (1933). Compare *Congregational Church Bldg. Soc. v. Everett*, 85 Md. 79, 36 Atl. 654 (1897).

<sup>23</sup> 6 AMERICAN LAW OF PROPERTY § 24.3 (Casner ed. 1952).

merely invalidate the executory interest of the issue and not effect the interest of the grandchildren, it is questionable whether it is really converse.<sup>24</sup> Nevertheless, the court could have preserved the present gift by adopting the former authority.<sup>25</sup>

The third question confronting the court would be whether the gifts to the issue of any deceased grandchild were valid and if not, what effect, if any, this would have on the gifts to the grandchildren. The court in the principal case stated in a dictum that if the interests did vest at the time of the testator's death, they would be subject to divestment should any of the beneficiaries die before the termination of the trust. The issue of those so dying would take as purchasers under the will.<sup>26</sup> The court did not, however, attempt to pass on the validity of the gifts to the issue. The general rule is that gifts to the issue of grandchildren born after the testator's death violate the Rule Against Perpetuities and are, therefore, void.<sup>27</sup> However, as the gifts to the issue of grandchildren born before the testator's death will vest at the death of their parents, and as their parents were lives in being at the time of the testator's death, these gifts do not violate the rule.<sup>28</sup>

Since the gift to the issue of those grandchildren born after the death of the testator is void, the question arises whether this would invalidate the gift to the other classes. The prevailing rule is that even though the gift to one class in a group of classes is void, this does not invalidate the gift to the remaining classes.<sup>29</sup>

In summary, the court might have saved the gift in the principal case by holding: (1) that the class of grandchildren would close no later than a nine months period of gestation after the death of the testator's son and the membership of the class would be determined at that time; (2) that the discretionary gift of income would cause the immediate vesting of the estate in the grandchildren

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<sup>24</sup> The interest of the grandchildren would actually be made indefeasible by the invalidation of the divesting contingency.

<sup>25</sup> See note 21 *supra*.

<sup>26</sup> 252 N.C. at 405, 113 S.E.2d at 903 (1960).

<sup>27</sup> *Lamkin v. Hines Lumber Co.*, 158 Ga. 785, 124 S.E. 694 (1924); *Bowman v. Taylor*, 126 Md. 203, 94 Atl. 652 (1915); *Hill v. Simmons*, 125 Mass. 536 (1878).

<sup>28</sup> *Shepard v. Union & New Haven Trust Co.*, 106 Conn. 627, 138 Atl. 809 (1927); *Turner v. Safe Deposit & Trust Co.*, 148 Md. 372, 129 Atl. 294 (1925); *Dorr v. Lovering*, 147 Mass. 530, 18 N.E. 412 (1888).

<sup>29</sup> *Bowman v. Taylor*, 126 Md. 203, 94 Atl. 652 (1915); *Hill v. Simmons*, 125 Mass. 536 (1878); *Cattlin v. Brown*, 11 Hare. 372, 68 Eng. Rep. 1319 (Eq. 1853).

in esse at the testator's death; (3) that the gift to the issue of the grandchildren born before the testator's death would be valid as their parents were lives in being at the testator's death; and (4) that although the gift to the issue of those grandchildren born after the testator's death would be void, this would not invalidate the gifts to the other classes.

Various attempts have been made to abolish the common law Rule Against Perpetuities either by judicial<sup>30</sup> or legislative<sup>31</sup> action. Although some of these statutes were ill-fated,<sup>32</sup> there seems to be a present tendency to adopt laws which eliminate some of the harsh effects of the rule.<sup>33</sup> While these statutes employ varied language, they are basically consistent. In eight states<sup>34</sup> the statutes apply to both real and personal property. In six states<sup>35</sup> they apply to both equitable and legal interest. In five states<sup>36</sup> they provide that the period of the rule should be measured by actual rather than possible events. In four states<sup>37</sup> they apply the principle of *cy pres*.

The Vermont statute<sup>38</sup> is applicable to both personalty and realty

<sup>30</sup> *Story v. First Nat'l Bank & Trust Co.*, 115 Fla. 436, 156 So. 101 (1934), applied the rule on the basis of facts which actually did occur, not those which might have occurred. *Edgerly v. Barker*, 66 N.H. 434, 31 Atl. 900 (1891), avoided the rule by applying the principle of *cy pres* to the will in question.

<sup>31</sup> *E.g.*, KY. REV. STAT. §§ 381.215 -223 (1960); VT. STAT. ANN. tit. 27, § 501 (1959).

<sup>32</sup> Connecticut, Indiana, Ohio and Wyoming repealed their statutes. This, according to Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952), was due to the fact that they were "hopelessly vague."

<sup>33</sup> *E.g.*, Connecticut: CONN. GEN. STAT. REV. § 45-95 (1958); Kentucky: KY. REV. STAT. §§ 381.215 -223 (1960); Maine: ME. REV. STAT. ANN. ch. 160, § 27 (Supp. 1959); Maryland: MD. CODE ANN. art. 16, § 197A (1960); Massachusetts: MASS. GEN. LAWS ANN. ch. 184A, § 1 (1955); New York: N.Y. SESS. LAWS 1960, ch. 448; Pennsylvania: PA. STAT. ANN. tit. 20, § 301.4(b) (1950); Vermont: VT. STAT. ANN. tit. 27, § 501 (1959); Washington: WASH. REV. CODE § 11.98.050 (Supp. 1959).

<sup>34</sup> Connecticut, Kentucky, Maine, Maryland, Massachusetts, New York, Pennsylvania and Vermont.

<sup>35</sup> Connecticut, Kentucky, Maine, Maryland, Massachusetts and Vermont.

<sup>36</sup> Kentucky, Maryland, Pennsylvania, Vermont and Washington. Connecticut, Maine and Massachusetts measure the periods of the rule by actual events only if the interest is to take place after lives in being.

<sup>37</sup> Kentucky, New York, Vermont and Washington.

<sup>38</sup> The Vermont statute reads in part: "Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of the rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate said rule and in reforming an interest the period of perpetuities shall be measured by actual rather than by possible events." VT. STAT. ANN. tit. 27, § 501 (1959).



and incorporates both the doctrine of *cy pres* and the policy of measuring the period of the rule by actual rather than possible events. It is submitted that the North Carolina legislature should adopt such a statute.<sup>39</sup>

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<sup>39</sup> Until such a statute is adopted by the legislature, the lawyer drawing a will in North Carolina would be well advised to see the saving clause suggested in Leach & Logan, *Perpetuities: A Standard Saving Clause to Avoid Violations of the Rule*, 74 HARV. L. REV. 1141 (1961).